

2010 WL 11053421 (Ark.Cir.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Arkansas.  
Pulaski County

Yvonne ROBINS,  
v.  
NORTHCARE, LLC, et al.

No. CV2009002635.  
January 15, 2010.

**Reply Brief in Support of Second Motion to Dismiss Convacare Management  
Inc., Convacare Inc., Convacare Health Systems, LLC, and Joey Wiggins**

Anderson, Murphy & Hopkins, L.L.P., 400 West Capitol Avenue, Suite 2470, Little Rock, Arkansas 72201, Telephone: 501-372-1887, Facsimile: 501-372-7706, E-mail: watson@amhfirm.net, [Brett D. Watson](#), Bar No. 2002182.

Come separate defendants, ConvaCare Management Inc., ConvaCare Inc., ConvaCare Health Systems, LLC, and Joey Wiggins, and for their reply brief in support of their second motion to dismiss, state:

**I. INTRODUCTION**

Defendants stand by their initial motion to dismiss and the arguments contained therein. Defendants file this reply brief in support of that earlier motion to dismiss in order to clarify their arguments and respond to plaintiff's mischaracterizations of defendants' arguments and misstatements of the applicable law. For the reasons, arguments, and analysis set forth in this brief, the Court should enter an order dismissing plaintiffs claims against these defendants.

**II. ARGUMENT**

**1. Violation of the Residents' Rights' Statute**

Plaintiff acknowledges in her response that she cannot maintain this cause of action against these defendants. *See* Plaintiff's Response at p. 16. As even plaintiff acknowledges, the state of the law in Arkansas prohibits claims for violations of the resident's rights statute to be made against any entity or person other than the licensee of a nursing home. Therefore, to the extent that plaintiff's claim can be read to apply to these defendants, it should be dismissed.

**2. Violation of the Deceptive Trade Practices Act**

Plaintiff extensively cites to her complaint in support of this cause of action against these defendants; however, none of the cited sections support a civil action for a Deceptive Trade Practices Act violation. Put simply, as stated in defendants' motion to dismiss, plaintiff does not allege any *knowing misrepresentation* or *actual reliance* on the part of Ms. Beck or her family.

Plaintiff alleges that defendants held themselves out to the Arkansas Department of Health and Human Services as (1) being skilled in the performance of nursing, rehabilitative and other medical support services; (2) being properly staffed, supervised, and equipped to meet the total needs of nursing home residents; (3) being able to specifically meet the total nursing home, medical, and physical therapy needs of Ms. Beck; and (4) being licensed by DHHS and complying with the applicable rules

and regulations established for nursing homes. In addition, plaintiff alleges that defendants, in fact, failed to discharge these obligations.

This allegation simply does not constitute a misrepresentation, let alone a knowing misrepresentation. Furthermore, there is not a single allegation contained in plaintiff's complaint that these alleged misrepresentations (if they could even reasonably be perceived as such) were directed toward Ms. Beck or her family, or that she or her family acted in reliance upon this information in choosing to admit Ms. Beck to this nursing home facility. As such, absent an allegation of knowing misrepresentation and reliance, plaintiff's claim cannot meet the basic requirements of fact pleading set forth in [Rule 8 of the Arkansas Rules of Civil Procedure](#). Therefore, this claim should be dismissed against all of these defendants.

### 3. Ark. Code Ann. § 16-118-107

In an attempt to maintain her felony **neglect** claim, plaintiff applies an irrational reading of the definition of a “caregiver,” which would produce absurd results wholly inconsistent with the legislative intent expressed by the statutory language. Under plaintiff's reading of this statutory definition, a “caregiver” would include an owner or officer of any public or private institution that has responsibility for the protection, care, or custody of an endangered adult. Such an interpretation would mean that someone as removed from patient care as the CEO of UAMS could conceivably be held liable for a **felony** should **neglect** occur to an endangered adult receiving care at UAMS. This is clearly not what was envisioned by the General Assembly in enacting this statute and it completely disregards the limited liability protections afforded to corporate owners and officers under settled Arkansas law. Furthermore, such a rendering would unconstitutionally impose criminal liability on corporate owners and officers. See *State v. Hock Shop, Inc.*, 681 N.W. 2d 669, 672 (Mich. App. 2004).

The only reasoned and reasonable interpretation of the definition of a “caregiver” would require that the individual or entity to be held criminally liable actually have responsibility set forth in the statute. In other words, reading the language as a whole, the individuals or entities listed (e.g., related or unrelated persons, owners, agents, high managerial agents of public or private organizations and public or private organizations themselves) must “[have] the responsibility for the protection, care, or custody of an endangered or impaired adult,” before they can be deemed a caregiver. See [Ark. Code Ann. § 5-28-101\(3\)](#). Such a rendering is consistent with the statutory language and avoids the absurd results mentioned above. Under this analysis, it is obvious that these defendants cannot be considered “caregivers” who may be held liable for a felony. If these defendants cannot be held criminally liable for the misconduct of their alleged agents or employees, then plaintiff's claim for felony **elder neglect** cannot stand.

In addition to arguments related to the definition of caregivers, plaintiffs complaint fails to allege specific **intentional** acts or omissions which constitute **neglect** under the statute. Absent specific allegations of intentional conduct on the part of each of these defendants, plaintiff has failed to allege specific facts in support of her cause of action as required under [Rule 8 of the Arkansas Rules of Civil Procedure](#). Therefore, plaintiffs claim for felony **elder neglect** against these defendants should be dismissed.

### 4. Negligence

Plaintiff argues that her “claims for ordinary negligence have not be abolished simply because a **medical injury** has occurred.” Plaintiffs Response at p. 2 (emphasis added). This argument defies logic and the unequivocal language of the Medical Malpractice Act. [Ark. Code Ann. § 16-114-202](#) (“This subchapter applies to all causes of action for medical injury.”).

Defendants do not deny that additional causes of action **can** coexist with a claim for medical malpractice. Instead, defendants would point out that all of the specific allegations made in plaintiff's complaint under the auspices of a negligence claim fall under the Act because they are, by definition, “medical injury” as even admitted by plaintiff in her response.

Plaintiff attempts to rely on allegations in the complaint of what she terms “custodial” care as opposed to “medical” care. These specific allegations include grooming, hygiene, bathing, repositioning, feeding, hydration, and other “custodial” matters. Although plaintiff calls these matters “custodial” in nature, that does not mean that they do not fall under the definition of “medical injury” and trigger the application of the Medical Malpractice Act. Due to the unique circumstances present in a nursing home setting and conditions in which certain residents are found, what plaintiff terms “custodial” and matters of ordinary care require much more specialized knowledge and training than plaintiff will acknowledge. What would be ordinary care for an individual not in a nursing home setting would require specialized care in the nursing home.

In order to elaborate further on this point, several examples are in order. Plaintiff refers to “turning or repositioning” of residents as a matter which requires only “ordinary” care. Despite plaintiff’s characterization of such services as “custodial,” her allegations are actually allegations that a medical care provider was negligent in the administration of professional medical services. Turning and repositioning is generally conducted pursuant to a physician’s order which sets out the frequency and manner in which such actions should occur. An individual off the street would not be permitted to come into a nursing home setting and simply move residents around and reposition them as they see fit. Rather, special considerations must be considered including the resident’s physical condition, propensity for skin tears, and a multitude of other factors on a resident by resident basis.

Another example involves nutrition and hydration. Decisions regarding the adequate amount of nutrition provided to a resident as well as meeting the hydration needs of these residents is not a matter left to the determination of an uninformed and untrained lay person. Instead, determinations regarding what is “adequate and appropriate” vary based upon the individual patient and their circumstances and physical condition. What could constitute adequate nutrition and hydration for one resident may not necessarily apply to another resident and it takes a delicate balance administered by skilled professionals in order to prevent or address instances of dehydration or malnutrition. These matters clearly require skilled professional medical services administered by trained CNAs and nursing staff.

The list goes on and such reasoning applies to each of plaintiff’s specific allegations found in her complaint. Put simply, what is ordinary and normal in a non-nursing home setting is extraordinary and requires specialized training given the delicate condition many residents find themselves in when they are initially admitted to a nursing home facility. After all, if such “custodial” care did not require this specialized training or knowledge, individuals would not take their loved ones to be admitted into these specialized facilities. As plaintiff’s allegations of negligence are merely restatements of an action for medical injury resulting from the professional medical services rendered by the staff of the facility, plaintiff’s negligence claim cannot stand.

## **5. Medical Malpractice**

Contrary to plaintiff’s arguments, “corporate defendants” is a vague term. Given the way in which this term is employed in plaintiff’s allegations for medical malpractice, it is not entirely clear whether or not Mr. Wiggins is included in the definition of corporate defendants. Nevertheless, plaintiff’s complaint fails to comply with the fact pleading requirements of [Rule 8](#) as it consists of only vague generalizations purportedly attributed to “defendants.” Plaintiff does not allege specific actions or facts attributable to each defendant. If plaintiff is to maintain a claim of medical malpractice against each of these defendants, she must allege specific facts attributed to each defendant to demonstrate a cause of action for medical malpractice. Given the current state of the pleadings, defendants simply have no way to respond or defend plaintiff’s general accusations as it is not clear which allegations apply to which defendant, let alone what allegations plaintiff claims constitute medical malpractice. For this reason, plaintiff’s vague and poorly plead claim for medical malpractice should be dismissed as against these defendants.

## **III. CONCLUSION**

For the reasoning, argument, and analysis set forth in defendants’ initial motion to dismiss and discussed herein, these defendants are entitled to a dismissal of plaintiff’s claims against them. Plaintiff has failed to meet the specific requirements of fact pleading

found in [Rule 8 of the Arkansas Rules of Civil Procedure](#) and has failed to allege specific facts to support distinct causes of action against each defendant. Therefore, defendants respectfully ask that the Court dismiss plaintiff's complaint against them.

WHEREFORE, separate defendants, ConvaCare Management Inc., ConvaCare Inc., ConvaCare Health Systems, LLC, and Joey Wiggins, pray that the Court grant their motion to dismiss, dismiss plaintiff's claims against them, and for all other relief to which they may be entitled.

ANDERSON, MURPHY & HOPKINS, L.L.P.

400 West Capitol Avenue, Suite 2470

,

Telephone: 501-372-1887

Facsimile: 501-372-7706

E-mail: watson@amhfirm.net

By:

BRETT D. WATSON

BAR NO. 2002182

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.